No. 14555

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA AND LEE ARENAS, APPELLANTS

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, APPELLEES

AND

LEE ARENAS, APPELLANT

v.

JOHN W. PRESTON, OLIVER O. CLARK AND DAVID D. SALLEE, APPELLEES

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLANT

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OPINION BELOW

The district court did not write an opinion.

JURISDICTION

The jurisdiction of the district court rested on the Act of August 15, 1894, 28 Stat. 305, 25 U.S.C. 345. The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether interest on attorneys' fees may be imposed against a fund in court which represents restricted Indian land.

2. Whether an attorney's lien on the proceeds of land recovered through his efforts in one suit includes expenses incurred in another suit.

STATEMENT

This is an appeal from those parts of a judgment ordering that interest on attorneys' fees and certain costs incurred by one of the attorneys, appellee herein, be paid from the proceeds of the sale of restricted Indian land which had been allotted to the Indians through the efforts of the attorneys. The facts are undisputed and may be summarized as follows:

In a suit brought against the United States in the United States District Court for the Southern District of California, under the Act of August 15, 1894, 28 Stat. 305, as amended, February 6, 1901, 31 Stat. 760, 25 U.S.C. 345,[1] by Lee Arenas it was held that he was entitled to allotments for himself and his deceased wife, Guadaloupe, of lands in the Palm Springs Reservation.[2] Thereafter trust patents were issued to Lee and the heirs of Guadaloupe. Appellee was one of three attorneys for Lee in that case. He also represented Lee in a subsequent suit against the United States and Lee's adopted daughter, Eleuteria, to establish his exclusive right to both allotments. But it was held that Eleuteria was entitled to one-half of Guadaloupe's allotment. See

[1] The 1901 amendment provided that such suits be brought against the United States.

[2] The judgment was affirmed by this Court (158 F. 2d 730) following a decision of the Supreme Court (322 U.S. 419).

197 F. 2d 418. Thereafter, this Court held, contrary to the Government's position, that as an incident of its jurisdiction under the 1894 Act as amended, the trial court could award fees to the attorneys of Lee Arenas for obtaining the allotments. *Arenas* v. *Preston,* 181 F. 2d 62 (1950). On April 6, 1951, the district court fixed a fee of $90,000, plus $258.67 advanced by the attorneys as costs. The judgment also provided that payment would be secured by an equitable lien upon the lands allotted to Lee and Eleuteria. It further provided that upon failure to pay within six months the lands would be sold to pay the awards and after deducting the cost of the sale any excess should be paid to the United States in trust for Lee and Eleuteria. But the judgment made no provision for interest on the $90,-258.67. This Court affirmed. *United States* v. *Preston,* 202 F. 2d 740 (1953).

That brings us to the instant litigation. Pursuant to a motion by appellee (R. 9), the district court on August 10, 1953, ordered the sale of the property and provided that attorneys' fees, with interest from April 6, 1951, the date of its judgment fixing the fee, should be paid from the proceeds (R. 8-14). The Government objected to the provision for the payment of interest (R. 15-18). The court amended the order to provide that interest should run from October 6, 1951, the end of the six-month period allowed for the sale (R. 18-19). A commission to sell the land was appointed (R. 21-22). However, Lee and Eleuteria arranged privately to sell some of the land for $122,114 (R. 65), which was deposited in court, and, pursuant to stipulation of the parties, the lien was transferred from the land to the fund (R. 25-45).

On July 9, 1954, appellee petitioned for payment from the fund of his share of the $90,258.67, with interest from October 6, 1951, and, in addition, $468 advanced to Lee in connection with his unsuccessful litigation with Eleuteria (R. 46-53). The district court found that the amount due on the judgment for attorneys' fees and costs was $90,258.67, plus interest thereon from October 6, 1951, at seven percent, amounting to $17,-725.80 (Fdg. 2, R. 63). Appellee's share of the principal and interest is slightly more than one-third.[3] It also found that appellee was entitled to $468.19, plus interest, or $552.40, for expenses advanced by him in the litigation between Lee and Eleuteria Brown Arenas (Fdg. 4, R. 64). The district court made conclusions of law consistent with its findings (R. 70-72) and on August 21, 1954, entered judgment accordingly (R. 73-78). This appeal followed (R. 79-80).

ARGUMENT

I

Interest on Attorneys' Fees May Not Be Imposed Against a Fund in Court Which Represents Restricted Indian Land

The land against which the lien for attorneys' fees was imposed was restricted Indian land held by the United States in trust for Lee and Eleuteria Brown Arenas. The proceeds of the sale of that land are now held by the court and, of course, are subject to the same restrictions as the land. *Sunderland* v. *United States,* 266 U.S. 226 (1924); *Ward* v. *United States,* 139 F. 2d

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[3] The other two attorneys have assigned their shares and some of the assignees have petitioned for distribution of the principal amount. But as a practical matter the disposition of the total interest of $17,725.80 will be settled by this appeal.

79, 82 (C.A. 10, 1943). This was recognized by the district court in the provision of its judgment (affirmed in *United States* v. *Preston,* 202 F. 2d 740) that any excess from the sale should be paid the United States in trust for the Indians. It is therefore clear that the United States has an interest in the fund in court and a suit involving such a fund is a suit against the United States. *Minnesota* v. *United States,* 305 U.S. 382 (1939); *United States* v. *Hellard,* 322 U.S. 363 (1944). Consequently only to the extent of the Government's consent may the fund be subjected to adverse claims. And consent to suit against the United States does not include consent to the imposition of interest, unless the consent statute expressly so states. *United States* v. *Hotel Co.,* 329 U.S. 585 (1947); *United States* v. *N. Y. Rayon Co.,* 329 U.S. 654 (1947); *United States* v. *Goltra,* 312 U.S. 203, 210-211 (1941); *Boston Sand Co.* v. *United States,* 278 U.S. 41 (1928).

This Court has already held that the Act of August 15, 1894, 20 Stat. 305, 25 U.S.C. 345, consenting to suits by Indians to establish their rights to allotments necessarily included consent to subject the trust allotments to the payment of fees to attorneys who prosecuted the claims. But it does not follow that the allotments (now represented by the fund in court) may be subjected to the payment of interest. The 1894 Act—and it is the only legislation upon which the claim can be premised—does not authorize the imposition of interest and therefore it may not be allowed. *Anglin & Stevenson* v. *United States,* 160 F. 2d 670 (C.A. 10, 1947), certiorari denied 331 U.S. 834. In that case attorneys had been employed on behalf of Indians to establish heirship to restricted Indian lands. After successfully establish-

ing the claims the attorneys were awarded fees for their services to be paid from the distributive shares of the claimants. The court of appeals affirmed the denial of interest on the awards on the ground that its allowance would constitute an award of interest against the United States. As the court said at p. 673:

> * * * consent of the United States to be bound by a judgment does not amount to an express consent that such judgment shall bear interest. When the judgment was entered and became final, the equitable jurisdiction of the [trial] court was exhausted. The imposition of interest on the judgment was not a part of the equitable process to which the Government expressly consented to be bound.

That case—and it is the only one dealing with the imposition of interest on restricted funds—is indistinguishable in substance from the instant case. For as has been shown (*supra,* pp. 4-5) the trust status of the property was not changed because it was converted from land to a fund in court. The court's power to disburse the fund was limited to payment of the amount awarded to the attorneys by the judgment of April 6, 1951, which has been affirmed by this Court. And since nothing in the 1894 Act, as amended, consents to the imposition of interest it is submitted that the allowance thereof was erroneous.

II

An Attorneys' Lien on the Proceeds of Land Recovered Through His Efforts in One Suit Does Not Include Claims For Expenses Incurred in Another Suit.

The only basis for the payment of fees and costs from the fund in court is that the land now represented by

the fund was recovered through the efforts of the attorneys and that the value of the services and the costs incurred are liens against the fund (see *Arenas* v. *Preston,* 181 F. 2d 62). This type of attorneys' lien is clearly a charging lien. See *Webster* v. *Sweat,* 65 F. 2d 109, 110 (C.A. 5, 1933); 7 C.J.S., Attorney and Client, sec. 211. Such a lien "never extends beyond the costs and fees due the attorney in the suit in which the judgment is recovered". *Everett, Clark & Benedict* v. *Alpha Portland C. Co.,* 225 Fed. 931, 937 (C.A. 2, 1915); see also 7 C.J.S., Attorney and Client, sec. 213 and cases there cited. Consequently there is no basis for allowing payment from this fund of the $468 advanced by appellee in a litigation having nothing to do with recovering the property now represented by the fund in court.

Moreover one-fourth of this fund is held in trust for Eleuteria Brown Arenas. The $468 was advanced by appellee in a suit brought against Eleuteria. And it is evident that she may not be charged—even to the extent of one-fourth—with the expenses of an unsuccessful suit against her.

It is therefore submitted that the allowance of this award was also erroneous.

CONCLUSION

For the foregoing reasons it is submitted that the parts of the judgment appealed from should be reversed.

Respectfully,

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